HO KAM PHAW

v.

FAM SIN NIN

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
WAN ADNAN ISMAIL CJ (MALAYA)
ZAKARIA YATIM FCJ
[CIVIL APPEAL NO: 02-1-1998(W)]
23 AUGUST 1999

CONTRACT: *Formation - Concluded contract - Contract signed by one party - Terms of contract agreed - Refusal of other party to sign contract - Whether there was a concluded contract*

The issue in this appeal was whether a contract, the terms of which had been agreed to by the parties, but which was signed by only one party, was a concluded contract.

Pursuant to the dissolution of a partnership between the parties, who were partners in a law firm, negotiations were entered into regarding settlement. The first draft of the settlement contract was sent by the solicitors for the respondent ('Fam') to the solicitors for the appellant ('Ho'). Ho's solicitors however proposed an amendment to the notice provision in the contract and forwarded a second draft incorporating the proposed amendment. Fam's solicitors objected to the second draft on the ground that it contained amendments other than those pertaining to the notice provision, and that "what was previously agreed had been changed" and returned the second draft.

Ho's solicitors denied making any changes other than to the notice provision but sent signed copies of a third draft to Fam's solicitors. Fam's solicitors replied in writing that the third draft was different from the second draft but did not dispute its contents. Fam however refused to execute the third draft.

In the High Court, the trial judge found that the third draft was the one which had been agreed to by the parties, which was different from the second draft, and held that no agreement had been concluded. The Court of Appeal, by a majority decision, confirmed the High Court's decision. Ho appealed.

Held:
Per Zakaria Yatim FCJ

[1] The third draft was essentially same as the first draft which had been agreed upon by both parties.

[2] When the second draft was rejected by Fam, it no longer became an issue between the parties. Ho had then reverted to the first draft, which was the same as the third draft, and had signed copies thereof.

[3] The evidence showed that Fam was ready to execute the first draft and therefore when the signed copies of the third draft were sent by Ho's solicitors to Fam's solicitors, there was already a concluded agreement.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu di dalam rayuan ini adalah samada sebuah kontrak, di mana terma-terma telah dipersetujui oleh pihak-pihak, tetapi hanya ditandatangani oleh satu pihak, adalah kontrak yang sempurna.

Menurut pembubaran perkongsian di antara pihak-pihak yang dahulunya rakan kongsi di dalam satu firma guaman, perundingan telah dijalankan untuk mencapai penyelesaian. Draf pertama untuk kontrak penyelesaian dihantar oleh peguamcara kepada responden ('Fam') kepada peguamcara kepada perayu ('Ho'). Peguamcara kepada Ho walaubagaimanapun mencadangkan satu pindaan kepada syarat mengenai notis di dalam kontarak dan menghantar draf kedua mengabungkan pindaan yang dicadangkan. Peguamcara kepada Fam membantah terhadap draf kedua atas alasan ia mengandungi pindaan selain daripada mengenai syarat notis, dan apa yang telah dipersetujui sebelum itu telah ditukar dan telah menghantar balik draf kedua tersebut.

Peguamcara kepada Ho menafikan membuat apa-apa penukaran selain kepada syarat mengenai notis tetapi telah menghantar salinan-salinan draf ketiga kontrak tersebut kepada peguamcara kepada Fam. Peguamcara kepada Fam menjawab secara bertulis bahawa draf ketiga tersebut adalah berbeza dari draf kedua tetapi tidak mempertikaikan kandungannya. Walaubagaimanapun Fam enggan menandatangani draf ketiga perjanjian tersebut.

Di Mahkamah Tinggi, hakim telah mendapati bahawa draf ketiga adalah draf yang telah dipersetujui oleh pihak-pihak, yang berbeza daripada draf kedua, dan memutuskan tiada perjanjian yang telah disempurnakan. Mahkamah Rayuan, dengan keputusan majoriti, mengesahkan keputusan Mahkamah Tinggi. Ho membuat rayuan.

Diputuskan:
Oleh Zakaria Yatim HMP

[1] Draf ketiga adalah sama dengan draf pertama yang telah dipersetujui oleh kedua-dua pihak.

[2] Bila draf kedua ditolak oleh Fam, ia bukan lagi satu isu diantara pihak-pihak. Ho kemudian telah kembali kepada draf pertama, yang sama dengan draf ketiga dan menandatanganinya.

[3] Keterangan menunjukkan bahawa Fam telah bersedia untuk melaksanakan draf pertama dan oleh demikian semasa salinan-salinan draf ketiga yang ditandatangani di hantar oleh peguamcara kepada Ho kepada peguamcara kepada Fam, perjanjian yang sempurna telah lama wujud.

[Rayuan dibenarkan dengan kos.]

For the appellant - Cecil Abraham (G Rajasingam & Cham Chee Khim with him); M/s Murthi & Partners
For the respondent - Joseph Yeo; M/s Joseph Yeo

[Appeal from Court of Appeal; Civil Appeal No: W-02-322-97]

Reported by Anne Khoo

JUDGMENT

Zakaria Yatim FCJ:

This is an appeal against the majority decision of the Court of Appeal (Mokhtar Sidin, JCA dissenting) which confirmed the decision of the learned High Court judge.

The appellant and the respondent were partners of a firm of solicitors. There were differences between the two partners and on 15 October 1996 they dissolved the partnership. After that they entered into negotiations to settle their differences in the form of a written agreement. The only issue before the learned judge was whether an agreement had been concluded between the parties. After considering all the correspondence and other documents before him, the learned judge decided that no agreement had been concluded. The Court of Appeal, by a majority decision, confirmed the decision of the High Court.

In order to determine this appeal, it is necessary to examine the correspondence and the other documents.

On 24 June 1996 the respondent's solicitors, Messrs. R.R. Sethu (Messrs. Sethu) wrote to the appellant's solicitors, Messrs. Murthi & Partners (Messrs. Murthi) informing them that "As the outstanding dispute is the service of the notice, Max Yong of Kiru & Yong, the solicitor who drew up the settlement agreement has amended cl. 3 of the draft." Attached to the letter was a copy of the amended cl. 3. The letter requested Messrs. Murthi to fix the time for the execution of the agreement "so that this matter can be concluded quickly and the audit of the accounts carried out in the interest of both parties."

This letter shows that before 24 June 1996 a draft settlement agreement had already been drawn up by Max Yong, a solicitor from Messrs. Yong & Kiru on the instruction of the respondent. We shall refer this draft as the first draft.

On 27 June 1996 at 4.30pm, there was a telephone conversation between Messrs. Sethu & Messrs. Murthi. On the same date Messrs. Murthi wrote to Messrs. Sethu by a fax transmission referring to the telephone conversation and requesting for a meeting to be arranged between Messrs. Murthi and John Fam at Messrs. Sethu's office.

It appears that in the telephone conversation referred to in Messrs. Murthi's letter, Messrs. Murthi had proposed some minor changes to the agreement. This is evident from Messrs. Sethu's letter dated on the same day. In that letter Messrs. Sethu suggested that the matter of the changes be discussed between Messrs. Murthi and Max Yong. Messrs. Sethu also suggested that the changes be identified by Messrs. Murthi in writing.

On 29 June 1996, Messrs. Murthi wrote a letter to Messrs. Sethu stating that the appellant had accepted the amended cl. 3 of the agreement. Messrs. Murthi, however proposed a minor amendment that "the notice of change of address be also sent by prepaid post." Enclosed with the letter were "four (4) sets of the deed of settlement duly executed by the appellant." These four sets of documents were the second draft.

On 2 July 1996, Messrs. Sethu, in response to Messrs. Murthi's letter dated 29 June 1996, sent a letter by hand to Messrs. Murthi. In that letter Messrs. Sethu wrote that the agreement sent by Messrs. Murthi which was signed by the appellant contained changes other than as to the notice provision. The letter went on to state that the changes were on cl. 7, cl. 8i, 8j and cl. 9. Messrs. Sethu said that at the request of their client they had sent a copy of the second draft to Max Yong for his comments. The letter stated:

> We refer to your letter dated 29.6.96 and copies of the agreement signed by your client. **These are returned herewith because our client had not agreed to the changes.** We had made it clear in our letter that any changes, proposed by your clients ought to be referred to and discussed with Mr. Max Yong of M/s Kiru & Yong first before we deal with them. This had not occurred.
>
> Further, the agreement contains changes other than as to the notice provision. **In particular, what was previously agreed had been changed:** instances are clause 7 (dealing with identity), clause 8i on the exercise of the option by our client of the right to purchase equipment under leasing; clause 8j; clause 9 as to the time and mode of payment of the books. Our client does not want these books; he only agreed to take them as your client did not want them; your client can take the whole lot and pay the value of RM20,000 to our client (subject to the problem on the present state of the bank accounts explained below). At our client's request we have forwarded a copy of your draft (though signed by your client to Mr. Max Yong for his comments).
>
> Without any previous notice to our client, and contrary to the basis of the negotiations for the settlement of this matter, your client had written a letter to the firm's bankers in relation to both the office and client's accounts that cheques drawn on either account ought not to be honoured without specific confirmation from your client. The bank has informed our client that all cheques drawn on either account would be dishonoured and that the remark endorsed would be "Refer to Drawer". (emphasis added)

On 5 July 1997, Messrs. Murthi replied that there were no changes to the first draft except the minor amendment on the notice of the change of address. To justify their statement that there were no changes, Messrs. Murthi asked Messrs. Sethu to compare the first draft with the second draft.

On 8 July 1996 Messrs. Murthi received a faxed copy of the deed of settlement from Max Yong. We shall refer this draft as the faxed copy. On 9 July 1996, Messrs. Murthi sent four copies of the faxed draft duly executed by the appellant. Messrs. Sethu wrote back on 10 July 1996 to say that the faxed draft was different from the second draft which they returned to Messrs. Murthi on 2 July 1996.

The learned judge, in his grounds of judgment concluded that the faxed draft was the draft that had been agreed to by the parties as at 24 June 1996. He then compared the faxed draft with the second draft and concluded that the draft signed by the appellant contained various changes when compared to the faxed draft.

In the Court of Appeal, Mahadev Shankar JCA confirmed that the faxed draft and the second draft were not the same.

Mokhtar Sidin JCA, in his dissenting judgment said that the second draft was rejected by the respondent. In his judgment, his lordship said that "Draft no. 3 is the same as Draft no. 1 without any amendment". He added that the second draft was not an issue any more. He then concluded:

> In my view by 9th. July 1996, when the Appellant's solicitors sent that signed Draft No. 3 there was already a concluded agreement.

Mokhtar Sidin JCA arrived at the above conclusion on the basis that the faxed draft was the same as the first draft.

We agree with Mokhtar Sidin JCA that the second draft was no longer an issue between the parties since it was rejected by the respondent. The appellant accordingly reverted to the first draft and signed four copies of the faxed draft.

In our view the first draft had been agreed to by both parties. The respondent was ready to execute the agreement as contained in the first draft. In their letter dated 24 June 1994, Messrs. Sethu wrote to Messrs. Murthi, "Kindly fix a date and time for execution preferably at our office as soon as possible ..."

When Messrs. Murthi sent the second draft to Messrs. Sethu, the respondent rejected it. Messrs. Sethu stated in their letter dated 2 July 1996, that the second draft contained changes. The letter went on to state that "What was previously agreed had been changed."

When the faxed draft, which was duly signed by the appellant was received by Messrs. Sethu, the latter merely wrote on 10 July 1996:

> These 4 agreements appear to be Photostated copies of the agreement faxed to your firm Messrs. Kiru & Yong which is different from the other copies which we returned to you with our letter of 2nd. July 1996.

In that letter the respondent did not dispute the content of the faxed draft. Instead, the respondent raised an issue that the appellant had instructed the bank to stop payment of monies due to clients. The letter said that because of these other issues, the respondent refused to execute the agreement.

In our opinion the faxed draft was the same as the first draft and as stated earlier, this draft had been agreed upon by both parties. This was expressly stated by Messrs. Sethu in their letter dated 2 July 1996. Therefore when Messrs. Murthi sent four copies of the faxed draft duly signed by the appellant, there was already a concluded agreement.

In their letter dated 10 July 1996, Messrs. Sethu wanted an additional indemnity clause to be incorporated into the agreement. This issue could be discussed by the parties separately. In this appeal, this court is only concerned in determining whether a settlement agreement had been concluded between the parties.

For the reasons stated above, we agree with Mokhtar Sidin JCA that as on 9 July 1996, there was already a concluded agreement. We therefore allow the appeal with costs.